

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMIE S. HOLMAN)	
Claimant)	
)	
VS.)	
)	
EPIXTAR CORP/NOL GROUP INC.)	
Respondent)	Docket No. 1,039,925
)	
AND)	
)	
ACE PROPERTY & CASUALTY INS. CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the July 30, 2008 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh (ALJ).

ISSUES

The ALJ granted claimant's request for medical treatment and temporary total disability (TTD) benefits after concluding that claimant suffered personal arising out of and in the course of her employment with respondent on March 26, 2008 and provided timely notice of her accident.

The respondent requests review of this decision arguing that claimant's recitation of the accident, which was unwitnessed, and her subsequent medical treatment is inconsistent and untruthful. And in light of the testimony of its own witnesses, the ALJ erred in awarding claimant benefits. Respondent maintains that claimant failed to meet her evidentiary burden to establish "personal injury arising out of and in the course of her employment."¹ Respondent asks the Board to reverse the ALJ's Order and deny claimant benefits altogether.

Claimant argues that the ALJ should be affirmed.

¹ K.S.A. 2007 Supp. 44-501(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

This member of the Board finds that the ALJ's Order sets forth his findings of fact and conclusions of law which are detailed, accurate, and fully supported by the record. The ALJ's findings and conclusions are specifically adopted as if specifically set forth herein and will not be restated.

Distilled to its essence, this claim turns upon the claimant's credibility and that of respondent's witnesses. Neither party's evidence is without some contradiction or inconsistency. Claimant alleges an injury occurred on March 26, 2008 when she fell on some stairs. Respondent denies this principally because there were no witnesses to the event and because it contends claimant's credibility is so compromised that nothing she says should be believed. This belief stems from respondent's perceived inconsistencies in claimant's testimony with respect to her conduct and the medical treatment she received in the hours and days following her alleged accident.

The ALJ was persuaded that claimant suffered a compensable injury on March 26, 2008. In light of respondent's arguments, he justified his decision as follows:

Looking at the whole record, there was a preponderance of credible evidence to show that the claimant injured her back on March 26, 2008 from the slip and fall on the stairs. There was certainly no evidence that the back injury was from any other source. The record also showed that the injury occurred either on the respondent's premises or on a route to and from the respondent's premises used only by employees of the respondent and not the general public. It is held that the claimant suffered a personal injury by accident arising out of and in the course of employment on March 26, 2008.²

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴

² ALJ Award (July 30, 2008) at 2. The record is unclear as to whether respondent was arguing that claimant's alleged accident was not compensable because she was on a break and potentially any injury might not, under K.S.A. 44-508(f) be compensable. Respondent did not assert this defense to the Board.

³ K.S.A. 2007 Supp. 44-501(a).

⁴ K.S.A. 2007 Supp. 44-508(g).

The Board has found that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In granting claimant's request for medical treatment and temporary total disability benefits, the ALJ quite obviously believed claimant's testimony over the respondent's representatives. He also noted that while some of the times reflected on the medical records were at odds with claimant's testimony, other medical records corroborated her version of the accident and the source of her injury.

Considering all the evidence, this member of the Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. Accordingly, the ALJ's preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁵ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated July 30, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

⁵ K.S.A. 44-534a.